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IN THE

Supreme Court of the United States

1971 - October Term
No.

NICHOLAS RICUCCI,

Petitioner,

--against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(2927)

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- -

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Nicholas Ricucci

respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on February 25, 1972, affirming a judgment of the United States District Court for the Southern District of New York convicting him of conspiracy and bribery (18 U.S. Code Secs. 201b and 2). The sentence imposed on each count was imprisonment for a term of one year, with the sentences to run concurrently (220; numerical references relate to pages of the transcript). Trial was held before Tenney, D.J., without a jury.

OPINIONS BELOW

No opinion was rendered by either of the Courts below.

JURISDICTION

The judgment of the aforesaid Court of Appeals was rendered and entered on February 25, 1972.

The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254. The basis for federal jurisdiction of the United States District Court was the provisions of 18 U.S. Code Secs. 201b and 2.

STATUTE INVOLVED

18 U.S. Code Secs. 201b and 2, so far as pertinent, provides:

> "Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official anything of value to any person or entity with intent...
>
> "to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States...
>
> "Shall be fined not more than

> $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both..."

QUESTIONS PRESENTED FOR REVIEW

1. Where an alleged payment is made after the conclusion of a matter and cannot possibly have influenced official conduct, does such payment come within the scope of the bribery statute?

2. Where a Government agent induces a party to commit the alleged offense, does this circumstance not constitute entrapment, so as to bar any prosecution therefor?

STATEMENT OF THE CASE

The appeal involves two counts of a superseding five-count indictment, of which the third count was dismissed by the trial Court at the conclusion of the Government's case (212), and counts four and five were severed (7).

The first count charges that between January 1, 1965, and January 1, 1970, defendant (petitioner) conspired with persons unknown to the Grand Jury, to pay Internal Revenue agents cash to influence them in connection with tax investigations relating to one Ich Himoff and one Bernard Laytin (18 U.S. Code Sec. 201). Any

implication of Laytin was apparently abandoned by the Government.

The second count charges that in or about September, 1966, defendant corruptly gave and promised $3,000 to such agents for the same purpose (18 U.S. Code Sec. 201b and 2).

The Court is respectfully requested to examine the evidence in its entirety because of the important bearing upon the points to be urged.

Max Unger, an Internal Revenue supervisor, testified as to preliminary investigation of the tax return of a Dr. Ich Himoff, caused by a bank report indicating

a large currency transaction, and the witness referred the matter to agent Milton Solomon (14-18).

David B. Barrash, the next witness, an accountant, had on the day of trial pleaded guilty to a violation of the bribery laws; and he had been convicted of another bribery in 1965, for which he had served a sentence (22). He identified defendant as a former Internal Revenue agent (22-23). In substance he told of having received a telephone call from defendant in August, 1965, about having been visited by a special agent who was seeking information concerning a cash transaction of Dr.

Himoff (23-24); and that defendant had suggested Himoff's contacting Barrash (25); that the witness met Dr. Himoff, who admitted having understated his income (27); that the witness referred him to an attorney, Mr. Louis Bender (27-28), and undertook to review Dr. Himoff's financial records, setting a fee of $5,000 as a retainer (28). The witness sent two men to Dr. Himoff's office to analyze records (29), and later discussed the sources of funds (30-31). Now Dr. Himoff denied any unreported cash and stated he had received various sums from his mother (30-31). None of these matters were mentioned to

defendant (31). In September, 1965, there was a meeting at the office of the witness at which agent Solomon and defendant attended (33); at that time the source of funds was discussed, the witness stating that the claim was reasonably substantiated (34); a supporting affidavit was later submitted (34). On the eve of the witness' own trial he sustained a serious ulcer attack and informed defendant of inability to continue efforts on Dr. Himoff's behalf (35), turning over to him all his papers (36). Subsequently the witness was visited by defendant, who said he had been "approached by some one" who said he

could get the matter closed in consideration of a payment of money (37). Defendant had been subjected to considerable harassment from Dr. Himoff and one Harry Louis (37-38). In October, 1965, according to the witness, he met Dr. Himoff at the home of the latter's brother, Dudley Himoff, defendant being present (38-39). The discussion related to the amount needed to finalize the matter (39-40), namely, $25,000. The witness then met alone with Dudley Himoff, who promised to pay the money in installments (41-42). In November, 1965, the witness told of seeing Dudley Himoff give defendant a brown paper bag (43), and a

similar incident occurred in April, 1967 (44); he never saw the contents but both parties told him it contained $10,000 (44). The witness gave defendant a check for $2,500, representing half of the retainer fee, for his work in connection with the investigation (45-46).

On cross-examination Barrash admitted that defendant, in mentioning having been approached by someone, did not indicate that it was anybody representing the Internal Revenue Service (51). It may be noted at this point that Barrash told of Dr. Himoff's unwillingness to retain a prominent tax lawyer, Mr. Myron Greene,

on account of the substantial retainer required (36). The indictment to which Barrash had pleaded guilty evidently related to a different transaction (54-57). On redirect the witness reiterated that he did not know any money was to go to an agent of the Internal Revenue Service (57).

William A. Betke testified he had been employed as a revenue agent from 1945 to 1970 (60-61), and was acquainted with defendant (61-62), who invited him to lunch in the fall of 1965 (62-63), wanting to know if agent Solomon could be contacted with a view to closing the Himoff case. The witness communicated with supervisor

Flannery and reported the conversation (64). The witness said Flannery asked for $5,000 to take care of the matter (64), which information was transmitted to defendant (65), with the result that they agreed to ask the taxpayer for $10,000 (66). The case was closed (66), and in May, 1966, he said that defendant gave him $3,000 (67), of which the witness gave Flannery $2,500 (68). Several months later, he said, defendant gave him $3,000, of which $2,500 went to Flannery (68-69), and finally he received $3,000, which he kept (69). On the day of trial herein he had pleaded guilty to an information charging

him with receiving a sum of money from defendant (70).

On cross-examination Betke admitted having taken about six bribes (71); that he was arrested in 1970 and had revealed the various bribes (74). He admitted that the Himoff case had already been closed (83) in May, 1966 (some four months prior to the date of payment mentioned in the indictment). The case had been closed by agent Solomon, whom the witness had never spoken to or approached (84); nor did Flannery ever tell the witness of having spoken to Solomon (84). Both payments, he said, were made to Flannery

after the investigation was terminated (86-88). The witness had no agreement with defendant as to the amount to be paid (91), and would have taken any amount (92). At the time of making the payments the witness admitted it was impossible to influence Flannery's, Solomon's or anybody else's judgment (103).

The foregoing testimony constituted the Government's case.

Defendant called agent Solomon as a witness (117). He testified in substance that he received the Himoff case on April 28, 1965, and reported that the matter lacked criminal potential (118). He

conferred with defendant and others and reported to Flannery (119-121). Neither Flannery or any other person influenced the Solomon report (122). Cross-examination did not affect Solomon's testimony, it being further elicited that he ascertained from examination of records that Himoff had inherited some $25,000 from the estate of his mother, who had died in 1962 (132).

Defendant took the stand (134); said that he was an accountant, and had been an Internal Revenue agent from 1954 to 1965 (134-135). He was reinstated in 1970, but at the time of the trial was under suspension pending disposition of the

case (136). He had been a patient of Dr. Himoff, knowing him for twelve or thirteen years (136). In July or August, 1965, Dr. Himoff spoke to him about being investigated by Internal Revenue agents, one of them being Solomon (137). Defendant suggested that he consult Barrash (whom Dr. Himoff knew very well) for aid in the accounting problem (138), and this was done. On September 15, 1965--at a time when defendant was separated from the service--he attended at an appointment Dr. Himoff had with Solomon, at which others were present (139). The discussion turned on the production of records (140).

The following month Betke encountered defendant and offered to help him in the Himoff matter, but defendant rejected the suggestion (143). He kept calling and plying defendant with the same offer, but without result (143-144). Finally Betke said it would cost $25,000 (145), and defendant reported the conversation to Dr. Himoff (146-147), telling him and the latter's brother-in-law that this was not the right course. Although he persisted in telling them they should not follow any such procedure, they kept on pressuring him (147). Eventually he relented, testifying to receiving the cash and turning it

over to Betke, but denying that he had kept any part (148-154).

The last witness called by defendant was Flannery, a certified public accountant since 1940 (183). He had been a group supervisor with the Internal Revenue Service until 1969 (184-185). Neither Solomon nor Betke had ever discussed the Himoff case with him (186-187), nor had Betke ever given him any money (187). His approval of Solomon's report was routine (189).

REASONS FOR ALLOWANCE OF WRIT

1. The alleged payment after the

conclusion of a matter could not have come within the scope of the statute, inasmuch as it could not have influenced official conduct.

Without again reviewing the evidence, we submit that the undisputed proof shows the Himoff matter to have been closed and concluded long before the payment alleged in the indictment or any other payment. Since the gravamen of the offense charged is the influencing of a public official, there manifestly can be no influencing with respect to a matter no longer under consideration. It must be remembered that since the Government's theory of prosecution did not turn upon any alleged

gratuity or ex post facto payment, the proof is not adequate to sustain the conviction.

In Blunden v. United States (C.A. 6), 169 F. 2d 991, defendants were charged with having given bribes to a Government employee to secure priority over other purchasers of surplus Government property. Since it was established that the employee had no authority to give such priority, defendants' conviction of having bribed a Government employee in his official capacity, under 18 U.S. Code Sec. 201, could not be sustained, and the Court so held.

Similarly, in United States v.

Gibson (D. C. Ill.), 47 F. 833, the statute was held to apply only to acts within the officer's official functions.

Moreover, an offer made in contemplation of a mere probability that the offeree may be called upon to perform official functions and intending to influence his conduct in the performance of such functions is not deemed an offer to bribe a Government employee. See Re Yee Gee (D. C. Wash.), 83 F. 145; United States v. Boyer (D. C. Mo.), 85 F. 425; United States v. Seagraves (D. C. Guam), 100 F.S. 424.

2. The record establishes an entrapment of petitioner, sufficient to

constitute a complete defense to any prosecution.

Once more we refer to the testimony of the several witnesses, from which it is clear that petitioner, despite his repeated expressions and indications of unwillingness, was hounded, harrowed and pressured on both sides, namely, by the taxpayer and by an agent, to lend himself to the making of the payments. When a Government agent is the inducing factor in the persuasion of an otherwise innocent and reluctant person, the inference of entrapment becomes proper. The law on the subject is fully discussed in United

States v. Sherman (C.A.2), 200 F.2d 882 and 240 F.2d 949.

It has recently been noted that the test of whether there was entrapment is whether an agent induced the accused to commit the offense, and, if so, whether the accused was ready and willing without persuasion but awaiting any propitious opportunity. United States v. Viviano (C.A.2), 437 F.2d 295. See also United States v. Weiser (C.A.2), 428 F.2d 932, and United States v. Riley (C.A.2), 363 F.2d 955.

Of course, if petitioner had denied any of the acts imputed to him, the defense of entrapment would not have been

available. Munroe v. United States, (C.A.N.M.), 424 F.2d 243. But herein we are confronted with a situation where appellant was frank and straightforward in admitting channeling the money, while making it clear that the procedure was contrary to his expressed wishes and the product of the repeated insistence of Internal Revenue agent Betke.

Under the circumstances it was essential to conclude that the acts were not the voluntary doing of petitioner but the product of pressure to the point of amounting to entrapment. Certainly the negation of entrapment was not established

beyond a reasonable doubt.

The foregoing constitute substantial questions, deserving of further review and clarification by this Court, not only for the instant case but to be decisive of like questions which may arise in future prosecutions.

The present petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said

Court of Appeals may be reversed, and that petitioner may be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y.,
March 20, 1972.

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JACOB W. FRIEDMAN,
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APPENDIX

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

APPENDIX

United States of America,

Plaintiff-Appellee,

v.

Nicholas Ricucci,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by

APPENDIX

counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 71-1205

In the Supreme Court of the United States

OCTOBER TERM, 1971

NICHOLAS RICUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1205

NICHOLAS RICUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging bribery and conspiracy to commit bribery in violation of 18 U.S.C. 201(b). He was sentenced to concurrent prison terms of one year. The court of appeals affirmed without opinion (Pet. App. A2-A3).

The evidence showed that petitioner, an accountant and former agent of the Internal Revenue Serv-

ice, represented one Ich Himoff before the Internal Revenue Service, which was investigating Himoff for understating his income. In October 1965 petitioner approached Internal Revenue Service Agent Betke and asked him to contact the group supervisor of Agent Solomon, who was conducting the Himoff investigation, to see if the supervisor would accept money to close the investigation. Betke contacted Solomon's supervisor, Lloyd Flannery, who stated that the Himoff investigation "could be prevented from going for criminal prosecution" but Flannery wanted "$5,000 for taking care of the matter." A few days later, when petitioner was informed of Flannery's terms by Betke, he and Betke agreed that they should also profit from the deal, and one of them suggested that at least $10,000 be obtained from Himoff (Tr. 35-36, 62-66). In mid-October 1965 petitioner informed Himoff that the investigation could be terminated for $25,000. Himoff agreed to pay that amount, provided he could pay it in two installments. Himoff gave petitioner $15,000 in November 1965 and $10,000 in April 1967. In January 1966 Agent Solomon, who was unaware of any bribery offer, terminated the investigation of his own accord after concluding that Himoff's understatement of income lacked criminal potential. Beginning in May 1966, petitioner gave Betke three payments totalling $9,000, of which Betke gave Flannery $5,000 (Tr. 38-41, 43-45, 66-70).[1]

[1] Petitioner testified that he paid Betke $25,000, which was the amount Himoff had given petitioner (Tr. 142-155).

1. Petitioner contends that payments to an Internal Revenue agent after an investigation has been closed do not fall within the scope of 18 U.S.C. 201 (b). However, the statute makes it a crime corruptly to offer a bribe to a public official. Petitioner offered a bribe in October 1965, three months before the Himoff investigation was closed. The crime was thus completed at that time regardless of when the payments were made. *United States* v. *Jacobs*, 431 F.2d 754, 759-760 (C.A. 2), certiorari denied, 402 U.S. 950.

2. Petitioner also contends that he was entrapped by Agent Betke to commit bribery. The entrapment defense, urged vigorously at trial, was rejected by the trial judge, who said (Tr. 212):

> Passing to the matter of entrapment, the Court finds that there is no basis for such a defense and that the defendant * * * made the initial moves with respect to Betke and that, accordingly, the fact that having asked Betke to sound out Flannery, whether or not Betke ever did so, the defendant set the wheels in motion and the subsequent solicitation or calls from Betke to the defendant did not constitute entrapment of the defendant.

Where the truth lay in the conflicting versions of the initial meetings between Ricucci and Betke was for the judge, the trier of fact, to determine. See *Osborn* v. *United States*, 385 U.S. 323, 331. Furthermore, since Betke was acting corruptly for his own benefit and not on behalf of a law enforcement agency (Pet.

13-16), the defense of entrapment was unavailable in this case in any event. See *United States* v. *Kabot*, 295 F. 2d 848, 854 (C.A. 2), certiorari denied, 369 U.S. 803. See generally, Note, *Entrapment*, 73 Harv. L. Rev. 1333, 1340-1343 (1960).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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